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**IN THE UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

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| PHILIP J. MARTINET, Individually, On Behalf of All Others Similarly Situated, and on Behalf of the General Public,<br><br>Plaintiff,<br><br>v.<br><br>SPHERION ATLANTIC ENTERPRISES LLC, a Delaware Limited Liability Company; and DOES 1 through 50, inclusive,<br><br>Defendants. | **CIVIL NO. 07-CV-02178 W (AJB)**<br><br>**CLASS ACTION**<br><br>**PLAINTIFF'S EX PARTE APPLICATION TO ALLOW FILING OF PLAINTIFF'S FIRST AMENDED COMPLAINT WITHOUT LEAVE OF COURT** |

Plaintiff PHILIP J. MARTINET ("Plaintiff") hereby moves the Court to direct the Clerk of the Court to file Plaintiff's First Amended Complaint without leave of court. Plaintiff's request is based upon this ex parte application, the accompanying declaration of Plaintiff's counsel, David A. Huch, as well as the pleadings, records and files in this action.

## I. INTRODUCTION

On or about September 25, 2007, Plaintiff filed a class action lawsuit in San Diego Superior Court [Case No. 37-2007-00075612-CU-OE-CTL] against his former employer, SPHERION ATLANTIC ENTERPRISES LLC ("Defendant"), alleging causes of action under the California Labor Code. Defendant answered Plaintiff's class action Complaint on or about November 14, 2007.

On or about November 14, 2007, Defendant removed Plaintiff's state court action to the present District Court pursuant to the Class Action Fairness Act, codified in relevant part in 28 U.S.C. § 1332(d). Plaintiff does not oppose Defendant's removal of this action to the present District Court.

At the time Plaintiff filed the original state court action, Plaintiff also intended to bring an additional claim under the Labor Code Private Attorneys General Act of 2004 ("PAGA") (California Labor Code § 2698 *et seq.*) for civil penalties. As a statutory prerequisite to that cause of action, Plaintiff provided Defendant and the California Labor & Workforce Development Agency ("LWDA") with written notice on September 25, 2007, via certified mail, of the specific provisions of the Labor Code alleged to have been violated by Defendant, and the facts and theories to support the allegations. (*See,* Declaration of David A. Huch ("Huch Decl.", ¶ 3.)

On October 17, 2007, the LWDA notified Plaintiff's counsel and Defendant that it had received Plaintiff's notice of the alleged California Labor Code violations. The LWDA has designated PLAINTIFF's Labor Code allegations against DEFENDANT as "LWDA No. 2750." (Huch Decl., ¶ 4.) More than 33 days have elapsed since Plaintiff notified the LWDA, via certified mail, of the specific provisions of the California Labor Code alleged to have been violated by Defendant. (Huch Decl., ¶ 4). To date, the LWDA has not notified Plaintiff that it intends to investigate the alleged violations contained in Plaintiff's notice. (Huch Decl., ¶¶ 4-5.)

Pursuant to California Labor Code § Section 2699.3(a)(2)(A), Plaintiff may commence a civil action against Defendant for civil penalties on behalf of themselves, the State of California and Defendant's other current and former aggrieved employees. Pursuant to California Labor Code § Section 2699.3(a)(2)(C), Plaintiff may **as a matter of right**, without leave of court, amend the original complaint to bring this cause of action under the Labor Code Private Attorneys General Act of 2004.

## II. PLAINTIFF HAS EXHAUSTED PAGA'S ADMINISTRATIVE PROCEDURE AND SHOULD THEREFORE BE ALLOWED TO BRING SUCH A CAUSE OF ACTION AGAINST DEFENDANT

PAGA allows for the recovery of civil penalties by a private litigant, or "aggrieved employee," for specific violations of the California Labor Code.[1] "An aggrieved employee" is defined as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." California Labor Code § 2699(c).

California Labor Code § 2699 provides that an aggrieved employee may recover civil penalties in a civil action filed on behalf of himself and other current or former employees against whom one or more of the alleged Labor Code violations were committed. California Labor Code § 2699(g)(1) provides that "nothing in this section shall operate to limit an employee's right to pursue other remedies available under state or federal law, either separately or concurrently with an action taken under this section."

PAGA includes an administrative procedure that the aggrieved employee must exhaust as a prerequisite to filing a civil suit. The administrative procedure in California Labor Code § 2699.3 requires 1) notice to the LWDA, 2) notice to the employer and 3) waiting a prescribed period of time to permit the LWDA to investigate and decide whether to cite the employer for the alleged violations.

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[1] The long list of the Labor Code sections to which PAGA's administrative requirements apply is set forth in Labor Code § 2699.5.

The various time periods within which the LWDA must investigate and/or issue citations against the employer (before a private litigant is allowed to bring a private cause of action under PAGA) are set forth in California Labor Code § 2699.3(a)(2). Subsection (a)(2)(A) provides:

> The [LWDA] shall notify the employer and the aggrieved employee or representative by certified mail that it does not intend to investigate the alleged violation within 30 calendar days of the postmark date of the notice received pursuant to paragraph (1). **Upon receipt of that notice** or if no notice is provided within 33calendar days of the postmark date of the notice given pursuant to paragraph (1), **the aggrieved employee may commence a civil action pursuant to Section 2699.** [Emphasis added.]

In the present matter, California Labor Code § 2699.3(a)(2)(A) has been satisfied. More than 33 days have elapsed since Plaintiff notified the LWDA, via certified mail, of the specific provisions of the California Labor Code alleged to have been violated by Defendant. To date, the LWDA has not notified Plaintiff that it intends to investigate the alleged violations contained in Plaintiff's notice. As a result, PAGA's administrative prerequisites have been exhausted and Plaintiff may commence a civil action under Section 2699.

## III. A TIMELY AMENDMENT UNDER PAGA IS PERMITTED "AS A MATTER OF RIGHT"

California Labor Code § 2699.3(a)(2)(C) expressly states:.

> Notwithstanding any other provision of law, a plaintiff may **as a matter of right** amend an existing complaint to add a cause of action arising under this part at any time within 60 days of the time periods specified in this part.
> [Emphasis added.]

Under the express language of subsection 2699.3(a)(2)(c), it is quite clear that amendment shall be granted "as a matter of right" and leave of court is not required. [*See Fairmont Ins. Co. v.*

*Superior Court* (2000) 22 Cal. 4th 245, 252-253—"as a matter of right" language in Code of Civil Procedure § 2024 signifies that leave of court not required.] Accordingly, Plaintiff moves for an order designating the filing date of this *ex parte* application as the electronic filing date of the FAC.

DATED: December 19, 2007 LAW OFFICES OF DAVID A. HUCH

s/ David A. Huch________________

DAVID A. HUCH

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